



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-162

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Law Office of Noelle Boostani, attorneys for respondent, by Noelle Boostani, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at The Churchill School (Churchill) for the 2020-21 school year. The appeal must be sustained in part and the matter remanded for further proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

With regard to the student's educational history, the evidence in this proceeding showed that the student presented with delays in his writing skills and experiences difficulties with mathematics, attention and focusing (Parent Ex. J at pp. 4-15; Dist. Exs. 3 at pp. 6-11; 5 at pp. 1-3). He has received the diagnoses of attention deficit hyperactivity disorder combined presentation, mild; specific learning disorder with impairment in reading (dyslexia; decoding, fluency) and in written expression (spelling, grammar, organization), both mild (Parent Ex. J at p. 15).

The student attended a district public school general education classroom for kindergarten and first grade (Parent Ex. J at p. 2). He then attended a general education classroom where he received integrated co-teaching (ICT) services during second grade and third grade (*id.*). In April 2019 at the end of third grade, the student also began receiving four sessions per week of pull-out special education teacher support services (SETSS) for English language arts (ELA) (Dist. Ex. 3 at p. 1). During the 2019-20 school year (fourth grade) the student attended a general education classroom and received ICT services along with SETSS from October 2019 through January 2020 (Parent Exs. C at p. 9; D; E; F at p. 8; J at p. 2; Dist. Ex. 3 at p. 1).

A private neuropsychological evaluation conducted in March 2019, indicated that the student's overall cognitive functioning fell within the high average range with verbal comprehension in the extremely high range and working memory, fluid reasoning, visual spatial skills and processing speed within the average range (Parent Ex. J at pp. 1, 13-14). Additionally, the neuropsychologist reported that some of the student's reading and writing skills were below grade level, his attention and executive functioning skills were below expectations, and that he met criteria for an attention deficit disorder (*id.* at p. 14).

On February 7, 2020, the district conducted an assistive technology evaluation which recommended the student trial a touchscreen tablet with a cloud-based file creation and sharing application, grammar check, keyboard and PDF annotator, in order to determine whether this technology would assist in meeting curricular demands (Dist. Ex. 4 at p. 8).

In March 2020, a district school psychologist conducted an educational evaluation as part of the student's three-year reevaluation, which indicated that the student was performing in the well-above average to average range academically with the exception of sentence building, which was below average (Dist. Ex. 3 at pp. 7-11). However, classroom assessments reflected in the evaluation report indicated that the student: was on grade level in reading; was performing below grade level in writing; and was performing slightly below grade level in math (*id.* at p. 10). Furthermore, the school psychologist opined that the student struggled with focus and attention in all classroom activities (*id.*).

The CSE convened on March 19, 2020, to conduct the student's annual review and it developed an IEP with a projected implementation date of March 27, 2020, for the remainder of the 2019-20 school year and a large portion of the 2020-21 school year with the projected date for the next annual review set for March 19, 2021 (see generally Dist. Ex. 5). Having found the student remained eligible for special education as a student with other health-impairment, the CSE recommended that he attend a general education classroom and receive ICT services in ELA, math, social studies and sciences (Dist. Ex. 5 at p. 6; see Dist. Ex. 3 at p. 1).¹

In a letter to the district dated August 18, 2020, the parent indicated that she disagreed with the recommendations contained in the March 2020 IEP, and notified the district of her intent to remove the student from the public school and unilaterally place the student at Churchill and seek public funding (see Parent Ex. KK).

¹ The student's eligibility for special education as a student with other health-impairment is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In an email dated September 23, 2020, the parent notified the district of her disagreement with the district's "most recent evaluation of the [s]tudent" and requested "funding" for a neuropsychological evaluation, an occupational therapy (OT) evaluation and "[a]ny other independent assessment" that the parent determined was necessary based on a review of information regarding the student's needs not previously disclosed (see Parent Ex. JJ).

A. Due Process Complaint Notice

In a due process complaint notice dated September 23, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).² The parent alleged that the district failed to: perform sufficient evaluations or identify the student's relative disability needs (id. at pp. 2-4). With regard to the May 2020 IEP, the parent alleged that the district failed to identify appropriate IEP goals, or recommend appropriate services (id. at p. 2).

According to the parent the district then failed to implement appropriate instruction methodologies, therapeutic interventions, accommodations and remote learning services in accordance with an appropriate remote learning plan (RLP), and did not monitor and report the student's progress toward the goals in the IEP (Parent Ex. A at pp. 2-3). Additionally, the parent contended that the district removed material services such as SETSS from the student's IEP without evaluating the student and in conflict with existing evaluative data (id. at pp. 2, 5).

The parent relisted or summarized several claims a second time (Parent Ex. A at pp. 6-8). Intermixed with the claims listed above, the parent also asserted that the district failed to sufficiently discuss and collaboratively determine the IEP recommendations with the CSE team; upon notice, failed to "cure it's failures to implement portions of the student's IEP and RLP services"; limited its program recommendations to the preexisting services on the district's continuum rather than based on the student's needs; and failed to provide the parent with meaningful participation and access to a copy of the procedural due process guidelines (id. at pp. 6-7).

Furthermore, the parent alleged, again with additional overlap with the claims above, that the district "failed to reasonably calculate and recommend appropriate services in the following areas": class size; student/teacher ratio; instructional levels and coursework materials; functional grouping; remedial interventions, methods of reporting and grading methodologies; an executive functioning assessment and plan; related therapies and services; classroom accommodations; testing standards and accommodations (Parent Ex. A at p. 7). Finally, the parent asserted that the district's actions were based on numerous "illegal policies" and the district's willful discrimination against the student (id. at pp. 7-8).

As relief, the parent requested that the IHO determine that the district failed to offer the student a FAPE, find that Churchill offered an appropriate program, that the parent acted equitably and to award full tuition funding and reimbursements for related tuition fees and costs and appropriate transportation services (Parent Ex. A at p. 2). Additionally, the parent requested as

² The IEP at issue had an implementation date of March 27, 2020, and was in effect until a new IEP was developed on or around March 19, 2021 (Dist. Ex. 5 at p. 1).

interim relief, transportation services for the duration of the proceeding and an interim or final order for the requested IEEs (*id.* at p. 8).

B. Impartial Hearing Officer Decision

The IHO convened the impartial hearing for a status conference on February 23, 2021, and proceeded to the evidentiary phase of the hearing on March 25, 2021, which concluded on May 20, 2021, after seven days of proceedings (Tr. pp. 1-908). In a decision dated June 17, 2021, the IHO determined that the district failed to offer the student a FAPE under the March 2020 IEP, that Churchill was an appropriate unilateral placement, and that there were no equitable considerations that would prevent or reduce an award of tuition reimbursement (IHO Decision at pp. 12-15). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Churchill for the 2020-21 school year (*id.* at p. 15).

The IHO commented on the parties' dispute regarding the removal of SETSS from the student's IEP, but did not make any clear finding on whether the student required SETSS as the parent alleged in her due process complaint (IHO Decision at p. 9). Although unclear, it appears that the IHO determined the student required "a little more than he was given in the ICT class" but as, further described below, determined that the "the management strategies, in conjunction with the goals are the 'little more' that the [s]tudent needed to derive educational benefits in writing" (*id.* at pp. 9, 11). The IHO's determination that the student was denied a FAPE appeared to center on the lack of math-specific and reading fluency annual goals on the student's IEP (*id.* at p. 11). The IHO reasoned that the neuropsychologist's diagnoses of dyslexia and dysgraphia were correct, regardless of the district's assertions that the student's deficits were the result of his inattention (*id.* at pp. 9-10). She concluded that the student's scores in sentence building, essay grammar and mechanics and oral fluency were well below his expected levels given his intelligence, which she opined, indicated a cause specific to particular areas of difficulty rather than general inattention, and found that the student had an underlying disability which affected his reading and writing skills because he did well on reading tests, but his oral reading fluency was consistently below his other abilities (*id.* at p. 9). The IHO noted that the neuropsychologist testified that "a slow reading speed was often a sign of dyslexia even among those who have remedied many of the other aspects of dyslexia" (*id.*). Additionally, the IHO found that the management strategies contained in the March 2020 IEP, in conjunction with the annual goals were the "little more" the student needed to derive educational benefits in writing as suggested by the neuropsychologist; however, the IEP did not contain annual goals related to mathematics or reading fluency (*id.* at p. 11). The IHO indicated that annual goals were required in all areas of need in addition to the present levels of performance, specifically indicating that the annual goals were more specific as to what was expected over the course of the school year, how to evaluate progress and the schedule of reports on progress (*id.*). The IHO held that without measurable annual goals and short-term objectives, the parents and school would have no way of determining whether changes to the IEP should be made mid-year, and noted that the error could have been caught, however it was not found prior to the time the parent enrolled the student in Churchill (*id.*).

Additionally, the IHO found Churchill was reasonably calculated to provide educational benefits and that there were no equitable concerns that would impede an award of tuition (IHO Decision at pp. 13, 15). The IHO ordered that the district reimburse the parent for the amount

already paid and directly fund the remaining tuition to Churchill for the 2020-21 school year (id. at p. 15).

IV. Appeal for State-Level Review

The specific details of the district's arguments in the request for review are familiar to the parties and will not be discussed here in detail. The gravamen of the district's appeal is that the IHO erred in finding the district denied the student a FAPE based "on a singular basis" -- inadequate goals. Specifically, the district argues that the IHO's conclusion that the March 2020 IEP did not include a reading goal was incorrect and that the goal for the student to complete a piece of writing included the ability to read and find text evidence to support his writing claim. Furthermore, the district claims that this goal was connected to the student's reading and writing skills and that because reading was "an area of relative strength for the [s]tudent" and he was "on grade level" an additional reading goal was not necessary. Moreover, the district argues that the student's test results, consistent with the teachers' reports, indicated that the student's reading comprehension was at grade level and his oral reading fluency was above grade level. Finally, the district argues that the IHO's use of the diagnoses of dyslexia, dysgraphia and learning disability to support her conclusion was a reversible error and noted that the district disputed this factual finding and requested that the IHO's credibility determination be reversed. The district argues that even if it is concluded that the student had a mild learning disability, the assessment data showed that it was not impacting the student's reading to the extent that a reading goal was necessary.

With respect to the March 2020 IEP lacking a math goal, the district contends that it was a clerical error. Furthermore, the district argues that according to the district psychologist, there was information regarding the student's math skills in the present levels of performance, as well as information provided in the assessments, that the teachers would have utilized when implementing the IEP. The district argues that the various assessments indicated the student's math skills were "below grade level", the IEP noted that he "particularly struggle[d]" in writing and math and contained several management needs that would have also been applied to his math instruction. The district further argues that such an omission did not necessarily amount to a denial of FAPE and the hearing record supports a finding that the district offered the student a FAPE for the 2020-21 school year.

The district further argues that the IHO erred in finding that Churchill was an appropriate unilateral placement for the student because it was overly restrictive insofar as the student did not need to be removed from the general education setting.

In an answer, the parent denies the district's allegations and argues that the IHO's decision should be upheld in its entirety. The parent's answer rambles on, meandering from topic to topic; however, the parent seems to indicate that the request for review failed to set forth sufficient facts from the record to be sustained, and then proceeds to recite facts related to a large number of issues that the IHO did not explicitly rule on, but it is unclear if the parent is advancing arguments that the IHO should have ruled on the unaddressed claims. The parent appears to agree that the IHO's most prominent finding regarding the district's denial of a FAPE to the student was the lack of math annual goals. The parent argues that Churchill was an appropriate unilateral placement and accuses the district's attorneys of unfair attacks and improperly conducting themselves during the impartial hearing.

In a reply, the district asserts that the parent's answer should be rejected because it was untimely served and is improperly verified in violation of Part 279 of State regulations.³

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

³ The district is correct that the parent failed to comply with the requirements of Part 279 which are explicit and govern proceedings before an SRO. But regardless of whether the answer was stricken for being late and non-compliant, it would not alter the outcome of this appeal.

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁴

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Initially, I note by way of clarification that in this matter the March 2020 IEP in dispute was effective for several months before the end of the 2019-20 school year (March to June 2020) which was also several months before the student was removed from the district and unilaterally placed for the 2020-21 school year; however, as the parent only sought reimbursement relief related to Churchill, the parent did not seek and the IHO did not award any relief for March through June of the 2019-20 school year (see Parent Ex. A at pp. 8-9; KK; IHO Decision at p. 15). As such, the relief in dispute in this appeal is the IHO's award of tuition reimbursement to Churchill for the 2020-21 school year beginning in September 2020.

In this case, the IHO appears to have made the FAPE determination in a ruling adverse to the district regarding the annual goals in the March 2020 IEP, and the decision appeared to also contain a reserved endorsement of the CSE's decision to recommend ICT services for the student. As further described below, I disagree with the IHO's view of the adequacy of the annual goals on the March 2020 IEP, and there is no challenge to the IHO's ICT services determination in this appeal. However, the IHO otherwise did not address many of the FAPE-related claims asserted by the parent in the due process complaint notice, which substantially hampers the ability of the parties to present arguments challenging her decision and by extension my ability to review the myriad of disputed issues in the case regarding whether the district offered the student a FAPE for the 2020-21 school year. Accordingly, as discussed below, I will remand this matter to the IHO for further proceedings. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). However, as the IHO did make limited findings with respect to FAPE related to the March 2020 IEP, and therefore capable of review in this decision, I will also address those issues below.

As noted above, the IHO based her finding that the district did not offer the student a FAPE upon the inadequacy of the annual goals, specifically, for math and reading (IHO Decision at pp. 11-12). The IHO found that the student had "an underlying disability" that affected his reading and writing, and that his math skills were below grade level (id. at pp. 9, 11).⁵ According to the IHO, the March 2020 IEP did not include annual goals related to math and "reading fluency or another area of reading" and without annual goals, the parent and school staff "would have no way

⁵ As previously noted, regarding writing, the IHO found that the March 2020 IEP management strategies, in conjunction with the annual goals, provided the student with what he needed to derive educational benefits in writing (IHO Decision at p. 11).

of determining whether changes to the IEP should be made mid-year" (*id.* at p. 11). The district appeals the IHO's finding that the student was denied a FAPE "on the singular basis that the goals were inadequate."

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). A discussion of the available evidence of the student's needs is necessary before turning to the issue of whether or not the March 2020 CSE was required to develop annual goals in math and reading in order to offer the student a FAPE.

Review of the hearing record indicated that the March 2020 CSE had before it and considered a March 2019 private neuropsychological evaluation report, a March 2020 educational evaluation report and a variety of classroom assessments and input from the student's teachers and the parent (Dist. Exs. 5 at pp. 1-3; 13 ¶9; 15 ¶16).

The March 2019 neuropsychological evaluation report reflected the results an administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), which placed the student in the high average range of cognitive ability with a full scale IQ of 112 (Parent Ex. J at p. 4). Additionally, the student's verbal comprehension was considered a strength and within the extremely high range, and his working memory, fluid reasoning, visual-spatial and processing speed skills were all in the average range (*id.* at p. 14). The neuropsychologist opined that the differences between the student's strongest composite score and his weakest were "statistically significant, indicating an uneven cognitive profile often associated with learning disabilities" (*id.*). Additional memory testing using the Wide Range Assessment of Memory and Learning – Second Edition (WRAML2) showed that the student's verbal and visual memory were both well developed, but "subject to fluctuations in attention" (*id.*). The March 2019 neuropsychological evaluation report reflected the results of the Neurological Assessment Battery II (NEPSY-II), Cognitive Assessment System, Second Edition (CAS-2), Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), Conners 3 Behavior Rating Scales, Beery-Buktenica Test of Visual Motor Integration, Sixth Edition (VMI) and observations (*id.*). The neuropsychologist indicated that the student's language processing showed "significant discrepancies and inconsistencies" with scores ranging from the 16th to the 84th percentiles and that variability and weaknesses in language processing skills were associated with language based learning disorders (*id.*). The neuropsychologist further reported that the student's attention and executive functioning skills were below expectations, and he met the criteria for an attention deficit disorder (*id.*). In summary, the neuropsychologist noted that the student's language processing, attention and executive functioning, and visual motor skills all showed weaknesses that were contributing to his academic difficulties and struggles (*id.*).

The March 2019 neuropsychological evaluation report indicated that the student's academic functioning was assessed using the Wechsler Individual Achievement Test, Third

Edition (WIAT-III) and the Gray Oral Reading Test – Fifth Edition (GORT-5), the results of which indicated that the student showed weaknesses in reading and writing, "while math skills [we]re more consistent and better developed" (Parent Ex. J at p. 14). The student's composite scores from the WIAT-III ranged from the 37th to the 86th percentiles with academic strengths apparent in reading comprehension and math problem solving and math calculation (id.). The neuropsychologist described that weaknesses were apparent in sentence construction, writing organization, handwriting, and reading fluency, specifically noting that the student's "variable and weak language processing abilities and grapho-motor weaknesses underlie his academic struggles" (id.). Furthermore, the neuropsychologist opined that the student's attention issues impacted his learning when he was unfocused and his weak executive functioning skills hindered his organization of schoolwork (id.). Social/emotional functioning and behavior assessment results indicated that the student was a "bright, creative, and well-adjusted [eight] year old with excellent family and peer relationships"; he did not present with any behavior problems and was cooperative and manageable; however, he struggled with impulsivity and distractibility, and frustration regarding learning disorders that were not being adequately remediated at school (id.).

The March 2020 educational evaluation was completed as part of the student's mandatory three-year reevaluation (Dist. Ex. 3 at p. 10). The March 2020 educational evaluation report contained the results of an administration of the WIAT-III, which indicated that the student's composite scores were in the average range in written expression and mathematics, in the above average range in basic reading, and in the well above average range in reading comprehension and fluency, and total reading (id. at p. 7). The student's subtest score profile in reading also ranged from average to well above average, and in written expression all subtest scores were within the average range with the exception of sentence building which was considered below average (id. at pp. 7-8). The student's subtest score profile for mathematics was in the average range for both math problem solving and numerical operations (id. at p. 8). The school psychologist who conducted the evaluation reported that math tasks were the student's favorite, especially math involving fractions, and noted that he was "much more eager and motivated while doing math" (id. at p. 10). The March 2020 educational evaluation report reflected teachers' reports that the student was meeting grade level expectations in reading, was performing below grade level in writing and required additional supports, and performed slightly below grade level on a recent fraction assessment but was "working well with the visual nature of fractions" (id.).

According to the March 2020 IEP present levels of performance, the student achieved a score of three (on grade level) on the spring 2019 administration of the New York State (NYS) ELA exam, and a four (above grade level) on the spring 2019 NYS math exam (Dist. Ex. 5 at p. 1). The Teachers College running record assessment administered in January 2020 indicated that the student was reading on grade level, his performance on the March 2020 Acadience 4th grade middle of year benchmark reading assessment yielded a "median of 120 words correct per minute on the [o]ral [r]eading [f]luency assessment," which was considered to be above grade level, and his performance on the MAZE assessment of reading comprehension was considered to be at grade level (id.). The IEP reflected that the February 2020 class assessment of opinion writing results indicated that the student was performing below grade level, specifically noting that he was slightly below grade level in using details from text as evidence, and was below grade level for introducing evidence, connecting evidence to claim and concluding statements (id.). The class assessment also indicated that the student was performing below grade level using punctuation and spelling words from texts correctly (id.). In math, the October 2019 in-class assessment of addition and

subtraction results indicated that the student was performing below grade level; the December 2019 in-class multiplication assessment showed he was performing below grade level in solving multiplication problems; the January 2020 in-class division assessment indicated he was performing "slightly below grade level" solving division problems; and the in-class fraction assessment from March 2020 showed he was performing "slightly below grade level" on fraction understanding and comparison (id.).

Additionally, teachers' reports reflected in the March 2020 educational evaluation report indicated that the student struggled with focus in all classroom activities and had difficulty focusing in small groups and partnerships (Dist. Ex. 3 at p. 10). The March 2020 IEP indicated that attention and focus were of concern and affected the student's participation in the classroom, and described the student as "in his own world sometimes," which impacted his ability to connect to what the class was learning or talking about (Dist. Ex. 5 at pp. 2, 3). Furthermore, the neuropsychologist opined that the student's attention issues impacted his learning when he was unfocused and his weak executive functioning skills hindered his organization of schoolwork (Parent Ex. J at p. 14).

Turning to the issue on appeal regarding the lack of a math annual goal, according to the March 2019 private neuropsychological evaluation report, the student achieved a WIAT-III mathematics composite standard score of 104 (61st percentile) and a composite math fluency standard score of 95 (37th percentile) (Parent Ex. J at p. 19). The composite scores consisted of the following subtests: math problem solving standard score 109 (73rd percentile); numerical operations standard score 99 (47th percentile); math fluency - addition standard score 100 (50th percentile); math fluency - subtraction 90 (25th percentile); and math fluency - multiplication 97 (42 percentile) (id.). The student achieved the following scores on the March 2020 administration of the WIAT-III: a mathematics composite standard score of 106 (66th percentile, average), which consisted of the following subtests: a math problem solving standard score of 102 (55th percentile, average) and a numerical operations standard score 109 (73rd percentile, average) (Dist. Ex. 3 at pp. 7-8). Further review of the hearing record indicated that the student began the 2019-20 school year at or above grade level standards in math (Tr. pp. 285; Dist. Ex. 5 at p. 1; 14 ¶9; 15 ¶8). According to special education teacher 1, the student began the 2019-20 school year with the ability "to do addition and subtraction of numbers in the tens and hundreds with reminders of strategies and models," he knew multiplication facts and was able to use them for division and multiplication, he had strategies based on concepts to solve problems and was able to apply those skills through fourth grade (Tr. p. 285).⁶

However, there is a larger factual context related to lapses in the student's math instruction during the first portion of the 2019-20 school year that the IHO did not grapple with, that immediately preceded the creation of the March 2020 IEP at issue. Beginning in September 2019, the evidence also shows that student was pulled from four out of five math classes per week for ELA SETSS because according to special education teacher 1, "we thought [the student] was very accomplished in math, and that it wouldn't be a big impact for him" (Tr. p. 300). In her direct testimony by affidavit, special education teacher 2 noted that the teachers were surprised that the

⁶ The student had two special education teachers providing ICT services during the 2019-20 school year: special education teacher 1 provided part-time ICT services and special education teacher 2 provided the student's SETSS in ELA and ICT services part-time (Tr. pp. 130, 451; Dist. Exs. 14 ¶2, 10; 15 ¶2, 8).

student began to struggle in math given that it was not noted anywhere in his previous IEP and he had scored a 4 on the State exam (Dist. Ex. 14 ¶13). She explained that students with ADHD often struggled to maintain focus during teaching time causing them to lose chunks of each lesson and opined that this was "likely a contributor to [the student's] struggles with math content" (*id.*). She further explained that as content became more challenging, they noticed that the student was holding onto old, learned strategies and not trying anything newer that was being taught (*id.*). Special education teacher 1 testified that the student was progressing in terms of having strategies to solve math problems; however, he was not progressing fast enough to be able to solve all of the problems on the assessments (Tr. pp. 226-27; *see* Dist. Ex. 9). She clarified that the student was improving in his assessments; however, he was not progressing as fast as the content was moving (Tr. p. 281). Special education teacher 1 testified that the student also had difficulty transitioning back into the classroom after receiving SETSS; however, when he remained in the classroom he followed the transitional supports that they had (Tr. p. 390).

According to special education teacher 1, missing four periods of math instruction in order to receive ELA SETSS affected the student's rate of learning and progress in math (*see* Tr. pp. 280-82, 317-18). As such, special education teacher 1 testified that the teachers reduced the amount of math instruction the student missed in order to receive SETSS, provided small group instruction, and "made strategic partnerships to support him as well" (Tr. p. 282). She testified that after changing the number of times the student was pulled out of math from four times to two times per week, the student made progress in that he was able to follow the content and solve the problems (*id.*). Additionally, she stated that at times when he was pulled out of math, the teachers "adjusted [their] stations" so that the student was present for direct instruction and small group work, and that he left the room during the independent work portion (Tr. p. 283). The special education teachers explained that the student's performance in math improved after these changes, and he was able to follow the content and solve problem; however, she noted that his strategies were not developing as quickly as they wanted so they continued to do small group support (Tr. p. 282; Dist. Ex. 14 ¶14). Both special education teachers opined that the student's performance improved with more class time which showed that there was some benefit to the schedule change (Dist. Exs. 14 ¶14; 15 ¶12). Accordingly, the evidence in the hearing record shows that the student had a history of performing well on standardized math assessments, and when provided with regular math instruction, was able to avail himself of the content in the math curriculum such that at the time of the March 2020 CSE meeting he was approaching grade level on in-class measures of math concepts (*see* Dist. Ex. 5 at p. 1). I do not view the dip in the student's math performance as resulting from a critical deficiency in the March 2020 IEP annual goals but as the result of a failure to provide sufficient, regular math instruction prior to the creation of the IEP, basic instruction that all students require, whether disabled or not.

With regard to the lack of a math annual goal, special education teacher 1 testified that the omission of a math goal in the March 2020 IEP was due to an error in their process (Tr. pp. 350, 391). She further testified that there was information about the student's math skills in the present levels of performance that the teachers would have used in their teaching as well as other the other assessments available (Tr. p. 391). Special education teacher 1 noted that the management needs contained in the March 2020 IEP specifically targeted the student's attention and focus needs and were developed from working methods used in the classroom (Dist. Ex. 15 ¶19). Those management strategies included the option to stand while working, the option to sit in a chair rather than the floor during group discussions, breaks outside of the room when possible, 1:1 redirection

and teacher attention to refocus, reminders and prompting, and teacher proximity (Dist. Ex. 5 at p. 4). The present levels of performance described the student's learning behaviors, supports the teachers had been providing that assisted him in accessing the curriculum and lessons, and noted that the student did "better in math when actively working on math concepts" (*id.* at pp. 2-3). The March 2020 IEP reported that the student had just started learning about fractions, which therefore was "hard" at that time, but that he found "other math easy" (*id.* at p. 3). Therefore the evidence in the hearing record shows that the March 2020 CSE identified the student's math strengths, needs, and concomitant attention difficulties that may have contributed to a decrease in his math performance, and provided management supports for his focusing deficits together with five periods per week of ICT services in math, such that the lack of an annual goal for math would not itself have prevented the student from progressing in the math curriculum or impeded his special education teachers from addressing the student's attention and focusing deficits that affected his math performance and does not rise to the level of a denial of a FAPE in this instance (*id.* at pp. 4, 6).

Next, the district contends that the IHO erred in finding that the lack of annual goals in reading, especially reading fluency, denied the student a FAPE. Review of the IHO's decision shows that the IHO was persuaded by the neuropsychologist's finding that the student evidenced apparent weaknesses in reading fluency such that he received a diagnosis of "mild" dyslexia (IHO Decision at pp. 9, 11; *see* Parent Ex. J at pp. 14, 15). As discussed in greater detail above, both administrations of the WIAT-III (March 2019 and March 2020), as well as the classroom assessments and teacher reports indicated that the student was at or above grade level in all aspects of his reading skills, therefore separate annual goals for reading were not necessary (Parent Ex. J at pp. 10-14, 18-19; Dist. Exs. 3 at pp. 7-10; 5 at pp. 1-3; 14 ¶9; 15 ¶8, 10). Specifically, at the time of the March 2020 CSE meeting, the present levels of performance—which are not in dispute on appeal—indicated that the student was "meeting grade level expectations" according to an assessment of his independent reading skill, his oral reading fluency skills were assessed to be "above grade level expectations," and the March 2020 IEP reflected reports that the student was "doing great with reading and reading comprehension" (Dist. Ex. 5 at p. 2). Even if the student was exhibiting "mild" deficits in reading skills, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (*J.L. v. New York City Dep't of Educ.*, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; *see C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). The March 2020 IEP provided the student with 10 periods per week of ICT services in ELA, in conjunction with the management strategies described above (Dist. Ex. 5 at pp. 4, 6).

The IHO's FAPE determination in this matter rested almost exclusively on an overly narrow point of questionable weight—the omission of annual goals related to reading and math—rather than focusing on the core issues that were challenged with respect to the student's written March 2020 IEP and the parent's allegations set forth in the due process complaint notice related thereto (IHO Decision at pp. 1-12).

Based on the foregoing, the IHO erred in failing to directly address numerous claims set forth in the due process complaint notice, particularly the claims that the district failed to implement special education services, bearing in mind that the March 2020 IEP went into effect at

approximately the same time as the State-wide shutdown of school buildings due to the COVID-19 pandemic. I also note that the student was then removed from the public school and placed at Churchill by the parent. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Additionally, as the matter must be remanded, IHO should specifically address all of the claims raised in the due process complaint notice that she failed to address, which include but are not limited to whether the CSE: performed sufficient evaluations; identified the student's needs; recommended appropriate services; provided appropriate testing accommodations, developed appropriate IEP annual goals excluding math and reading and monitored/reported progress toward those IEP goals; and removed material services from the student's IEP without evaluating the student and in conflict with existing evaluative data (see Parent. Ex. A). Also, the parent raised claims regarding the implementation of appropriate instructional methodologies, therapeutic interventions, accommodations, and remote learning services during the COVID-19 pandemic shutdown, which were not addressed by the IHO and should upon remand (id.).⁷

Finally, as to the district's assertion that the IHO erred in finding Churchill was an inappropriate unilateral placement because the IHO failed to find that Churchill was overly restrictive, it is true that the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]); however, parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). Accordingly, I find the district's LRE contention unavailing as it places undue weight on that factor. Further, the district's one-sentence assertion that the IHO pointed to some areas of weakness in the Churchill programming and then pointed to the parent's contentions regarding the student's dyslexia and dysgraphia overlooks the IHO's careful weighing of factors that the IHO was required to consider when examining the totality of the circumstances of the unilateral placement.⁸ Other than pointing

⁷ On remand before simply presuming that specific methodologies were required, the parent should first explain what mandated methodologies, therapeutic interventions, or accommodations were called for in the IEP that the district refused to implement.

⁸ The stronger argument was the district's related assertion before the IHO that substantively, Churchill provided

to the fact that the IHO found some areas of weakness, the district does not sufficiently assert any actual error on the part of the IHO's in this regard. I decline to reverse the IHO's determinations with respect to Churchill, which were more thoughtfully set forth than the district's challenges.

VII. Conclusion

Having found that the IHO erred in her determination that the district failed to offer the student a FAPE on grounds that the March 2020 IEP did not contain appropriate annual goals, the IHO's decision regarding a FAPE must be reversed and the matter must be remanded for reconsideration by the IHO upon further development of the hearing record if necessary and in accordance with this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 17, 2021, is modified by reversing that portion that concluded the district failed to offer the student a FAPE for the 2020-21 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a new determination regarding whether the district offered the student a FAPE for the 2020-21 school year by analyzing the parent's remaining IEP and implementation claims raised in the due process complaint notice.

Dated: **Albany, New York**
 September 10, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

special education interventions that were similar to the strategies proposed by the district. There is no need to overcomplicate it (see IHO Ex. XI at p. 19).